STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY HENDERSON,

Defendant-Appellant.

UNPUBLISHED
February 16, 2006

No. 257771
Wayne Circuit Court
LC No. 04-004262-01

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, assault with intent to murder, MCL 750.83, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to concurrent sentences of natural life in prison for the murder conviction, 30 to 60 years in prison for the assault with intent to murder conviction, and 40 to 60 months in prison for the felon in possession of a firearm conviction. Defendant also received a consecutive two-year sentence for the felony-firearm conviction. We affirm.

Defendant first contends that the trial court provided an erroneous jury instruction on reasonable doubt. However, when the trial court asked the parties if they had any objections to the jury instructions, defense counsel stated, "I have no objections to the instructions, your honor." Because defendant waived any instructional error, any such error is extinguished. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

Next, defendant argues that the prosecutor committed misconduct. Defendant did not object to any of the alleged prosecutorial misconduct. Therefore, this argument is unpreserved, *Matuszak*, *supra* at 48, and we review it for plain error, *People v Carines*, 460 Mich 750, 772; 597 NW2d 130 (1999).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant first argues that the prosecutor improperly stated that there is "[n]o such thing as proof beyond a reasonable doubt," and that a reasonable doubt is one "which you can place a reason to." Considered in context, it appears that this was an isolated, accidental misstatement. The gravamen of the prosecutor's argument was clear: while the prosecution must prove defendant guilty beyond a reasonable doubt, the proof beyond all doubt standard does not apply. The repeated statements of the prosecutor, prefacing and following the misstatement, that the people had the burden of proving defendant guilty beyond a reasonable doubt, had the prophylactic effect of preventing any prejudice from the misstatement. Additionally, the trial court's reasonable doubt instructions to the jury cured any prejudice. *Id.* Therefore, we discern no error.

Defendant next argues that the prosecutor's description of the Detroit Police Department as overworked, understaffed, and under funded amounted to misconduct because it appealed to jurors' self-interest as taxpayers. Defendant admits that "[d]efense counsel argued that the failure to test the victims for gunshot residue raised a reasonable doubt [regarding] whether the shooting had been at close-range." In response, the prosecutor argued: "You have the Detroit Police Department, overworked, understaffed, and underfunded [sic], and you're asking them to go do something that doesn't make sense." The prosecutor may respond to defense arguments, *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002), and need not make bland arguments, *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005). Because the prosecutor was simply responding to the defense argument and arguing on the basis of the evidence, we discern no error in this statement.

Defendant next argues that the prosecutor vouched for the truthfulness of the charges by implying that he had some special knowledge of the facts. Defendant objects to the following argument by the prosecutor: "The basic reason is, I'm trying to be here putting the facts forth. Wherever the facts go, that's where we get led. . . . I'm presenting facts." However, immediately following the quoted comments, the prosecutor stated:

> And again, also, I continue to use the term that we have to prove – the People have to prove. What the People do is, we present the evidence.
>
> I myself am not proving anything. Because I wasn't out there at Keeler and Hazelton. I'm not giving testimony. . . .

In context, it is clear that the prosecutor was not implying that he had special knowledge of the facts. This argument was not improper.

Defendant next argues that the prosecutor disparaged the defense by insinuating that defense counsel did not believe his own client. Defendant objects to the following comment by the prosecutor: "I'm not here to try to mislead, confuse, bring up red herring[s] so that you don't follow the facts." The prosecutor's comment did not denigrate defense counsel. Rather, it urged that he was presenting the facts and relying on the evidence. A prosecutor need not state arguments in the blandest possible terms. *Williams, supra* at 71. This argument was not improper.

Defendant next argues that the trial court erred in denying his motion to suppress his confession. An appellate court reviews de novo a trial court's ultimate decision on a motion to

suppress evidence. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). This Court will not disturb a trial court's factual findings from a *Walker*[1] hearing unless clearly erroneous. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). "A finding is clearly erroneous when, although evidence supports it, this Court is left with a firm conviction that the trial court made a mistake." *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005) (punctuation and citation omitted). This Court gives deference to the trial court's determination of credibility, and will not substitute its judgment for that of the trial court. *Id.*

The prosecution bears the burden of proving voluntariness by a preponderance of the evidence. *Daoud, supra* at 634. This Court considers the totality of the circumstances, including, but not limited to, the age, education, and intelligence of the suspect as well as his capacity to understand the warnings, his rights, and the consequences of waiving his rights. *Id.* at 633-634.

Defendant gave his first exculpatory statement to Officer Olie McMillan on the night of the incident. Officer McMillan read defendant his rights and allowed defendant to read his rights. Defendant signed the advice-of-rights form and initialed each line. Defendant conceded at the *Walker* hearing that McMillan read him his rights. Defendant gave his confession the next day to Sergeant Marian Stevenson. Stevenson read defendant his rights and gave him the advice of rights form to re-read. Defendant read his rights aloud and indicated that he understood them both verbally and by initialing each of the rights. Defendant conceded at the *Walker* hearing that Stevenson read him his rights. Stevenson recorded defendant's statement in writing. In the statement, defendant acknowledged that he had not been threatened to make the statement, and made it freely. Neither officer observed defendant to be intoxicated. Both officers denied that defendant suffered any physical abuse. Although defendant testified at the hearing that he was under the influence of drugs and alcohol when he was arrested, that he had asked for a lawyer, that a police officer slammed him against a wall, that he did not understand his rights, and that Stevenson promised him he would not be charged with first-degree murder if he talked, we defer to the trial court's determination of credibility. On this record, we cannot conclude that the trial court clearly erred in finding that defendant's statements were knowing and voluntary.

Defendant next argues that he was deprived of his right to the effective assistance of counsel. If a defendant fails to move in the trial court for a new trial or an evidentiary hearing with regard to the ineffective assistance claim, appellate review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court are reviewed for clear error, and questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

under the Sixth Amendment. *People v Pickens*, 446 Mich 298, 312-316; 521 NW2d 797 (1994). The defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza, supra* at 255.

First, trial counsel's failure to object to the court's reasonable doubt instruction did not constitute ineffective assistance of counsel. The trial court's reasonable doubt instruction was not erroneous. Defense counsel was not obliged to make a futile objection. *People v Hill*, 257 Mich App 126, 152 n 15; 667 NW2d 78 (2003).

Second, trial counsel's failure to object to the alleged prosecutorial misconduct did not constitute ineffective assistance of counsel. As explained, *supra*, the prosecutor's arguments did not constitute misconduct. Again, defense counsel was not required to make a futile objection. *Id.*

Third, defense counsel's failure to request an expert on false confessions and an identification expert did not constitute ineffective assistance of counsel. Normally, decisions on what evidence to present and whether to call witnesses are presumed to be matters of trial strategy, which this Court will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Counsel will be deemed ineffective for failing to call a witness only if it deprives the defendant of a substantial defense. *Id*. With regard to the false confessions expert, defense counsel's decision not to request an expert did not deprive defendant of a substantial defense when defendant testified at the *Walker* hearing that his confession was truthful. With regard to the identification expert, this Court noted in *People v Cooper*, 236 Mich App 643; 601 NW2d 409 (1999) that "trial counsel may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." Moreover, defense counsel thoroughly cross-examined Jones regarding the circumstances of his identification and argued that the Jones was not sure that defendant was the shooter. On this record, we conclude that defendant has failed to sustain his burden of proving that defense counsel deprived him of a substantial defense by deciding not to call an identification expert.

Because we have discerned no errors, we also reject defendant's claim of cumulative error. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly